Supreme Court, U.S.
FILED
JUN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1088

IN THE

Supreme Court Of The United States

October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner/Appellant,

v.

ALAN WOODS AND CARA WOODS,
Respondents/Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

The Appellant has stated the questions:

I. WHETHER ALABAMA CODE SECTION 12-22-72 (1975), WHICH IMPOSES A MANDATORY PENALTY OF TEN PERCENT OF THE AMOUNT OF JUDGMENT ON AN UNSUCCESSFUL DEFENDANT-APPELLANT, WHILE IMPOSING NO SIMILAR PENALTY ON PLAINTIFF-APPELLANTS, IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

II. WHETHER THE STATUTORY AFFIRMANCE PENALTY IS A RULE OF PROCEDURE AND NOT APPLICABLE TO ACTIONS IN FEDERAL COURT.

We agree with this statement of the issues.

PARTIES TO THE PROCEEDING

We agree with the list of parties and affiliated or related parties as printed at page ii, Petition for Writ of Certiorari.

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BRIEF OF APPELLEES

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals, related to the substantive issues in the case, appears at 768 F.2d 1287 (11th Cir. 1985) and is printed at Appendix D of the Petition for Writ of Certiorari. The Order of the Eleventh Circuit denying Petitioner's motions for a stay of proceedings or in the alternative for oral argument is printed at Appendix M of the Joint Appendix. (J.A. 39) The Order of the Eleventh Circuit granting Respondents' motion for ten percent penalty assessment pursuant to Alabama statute is printed at Appendix A of the Petition for Writ of Certiorari. The Order of the Eleventh Circuit denying rehearing is printed at Appendix N of the Joint Appendix. (J.A. 40)

JURISDICTION

The Appellant on page 2 of its brief has correctly set forth the provisions of law concerning jurisdiction of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Appellant, by an Appendix, has set forth constitutional provisions, statutes and rules. By an Appendix to this brief, we have set forth additional statutes and the Consumer Price Index.

STATEMENT OF THE CASE

The Appellees accept the Appellant's Statement of the Case.

SUMMARY OF THE ARGUMENT

This Appeal challenges the constitutionality of Ala. Code Section 12-22-75 (1975). This Code section requires the assessment of a 10% affirmance fee when the payment of a money judgment has been stayed during the pendency of an unsuccessful appeal. The Appellant contends this statute is unconstitutional as being violative of the First and Fourteenth Amendments to the Constitution of the United States.

The Appellees contend the statute is constitutional. It has constituted the law of Alabama for 166 years; its constitutionality has been upheld on many occasions by the Supreme Court of Alabama; on three occasions by the Fifth Circuit Court of Appeals, and on two occasions by the Eleventh Circuit Court of Appeals. A similar Kentucky statute was held constitutional by the Supreme Court of the United States in the case of *Louisville & Nashville Railroad Co. v. Stewart,* 241 U.S. 261, 263 (1916). The correctness of this ruling has never been challenged or overruled. The statute does not violate the due process clause of the Fourteenth Amendment and it does not deny to the losing party any right to appeal. It applies only in those

cases where the payment of a judgment is stayed by the execution of a supersedeas bond. The Constitution of the United States does not require that a state provide for a stay of execution. If it does make provision for a stay, the state can attach reasonable conditions to that right. The requirements of this statute are not arbitrary because they apply to every party against whom a money judgment has been obtained regardless of race, status or financial standing.

The Appellee's second contention is that the statute should not have applicability in the federal courts because it conflicts with the Federal Rules of Appellate Procedure. This argument is untenable because the statute addresses one situation and the rules address another. Rule 38, F.R.A.P., deals with frivolous appeals or those taken for the purpose of delay. The Alabama statute applies to unsuccessful appeals when execution has been stayed. Alabama's Rule 38, A.R.A.P., is almost identical to Federal Rule 38, F.R.A.P. Alabama Rule 38 and Ala. Code Section 12-22-72 (1975) both have a field of applicability, one to frivolous appeals and the other to appeals where the plaintiff has been denied the use of the money awarded him during the pendency of the appeal.

ARGUMENT

Factual Background

The Appellee, Alan Woods, received serious injuries on August 14, 1982. He filed suit against Burlington-Northern Railroad Company in the Jefferson County Circuit Court in Bessemer, Alabama, on October 12, 1982. The defendant removed the case to the United States District Court on November 15, 1982, based on diversity of citizenship. Discovery was completed and the trial commenced January 10, 1984. The jury found the railroad 100% responsible and the plaintiff free of any negligence. The District Judge entered judgment January 13, 1984. The defendant filed a Motion for JNOV or New Trial on January 23, 1984, which was overruled on June 29, 1984. Notice of Appeal to the Eleventh Circuit Court of Ap-

peals was filed on July 24, 1984. After briefs and oral argument, the Eleventh Circuit affirmed the judgment on August 16, 1985. *Burlington Northern Railroad v. Woods,* 768 F.2d 1287 (1985). A Petition for Rehearing was filed and overruled (A-30-38).

On September 19, 1985, the Eleventh Circuit granted the Appellees' Motion to Assess 10% statutory damages provided by Ala. Code Section 12-22-72 (1975) and said, "The question is controlled by binding precedent" (A-39).

It is significant that this plaintiff was seriously injured almost four years ago, and he obtained a judgment over two years ago. This judgment went unpaid for a period of nineteen months, and he is still involved in litigation.

The plaintiff's problems were commented on by the Eleventh Circuit as follows:

> The jury could have found from the evidence that plaintiff Alan Woods sustained painful and serious injuries, that required two surgical operations, that resulted in permanent pain and disability and that will result in a permanent reduction in earnings.

I. Is The Alabama Affirmance Fee Statute (Ala. Code Section 12-22-72 (1975) Unconstitutional Under The Equal Protection and Due Process Clauses of The Fourteenth Amendment?

Alabama Code Section 12-22-72 (1975) does not violate either the equal protection or due process clauses of the Fourteenth Amendment. There are several significant aspects of this statute, namely:

(1) It does not impede an appeal by any party.

(2) It applies to any party who stays execution on a judgment rendered in cases where a money judgment has been entered against him.

(3) It only applies when the party against whom the judgment was rendered obtains a stay of execution by posting a supersedeas bond.

(4) It is only applicable when the party against whom the judgment was obtained is unsuccessful on appeal.

This statute, with minor and insignificant changes, has been the law of Alabama since 1820. The Supreme Court of Alabama has considered many times, and it has withstood every attack. It has been applied by both the Eleventh Circuit and Fifth Circuit Courts of Appeal.

Construction By The Alabama Supreme Court

The Supreme Court of Alabama first considered this statute in December, 1823, in the case of *Heart v. Judson,* Minor 135 (1823).[1] In its opinion, the Court said:

> If it were for us to consider the reason and policy of the statutes, *it would seem that an obstinate debtor who refuses to liquidate his debt, should not be benefited by his injustice;* and even in actions ex delicto, the satisfaction of the judgment should not be delayed without responsibility for damages. (Emphasis supplied)
>
> It is the unanimous opinion of the court that the judgment of the circuit court be affirmed with 10% damages.

Almost forty years later, the Supreme Court of Alabama again considered the statute in the case of *Lawrence v. Jones,* 37 Ala. 388 (1861).[2] The question presented was whether interest on the judgment should be included in computing the 10% affirmance fee. The supreme court affirmed the assessment of the 10% fee, but limited it to the judgment and not the accrued interest on the judgment. The opinion concluded:

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[1]For the convenience of the Court, a copy of *Heart v. Judson,* Minor 135 (1823), is attached as part of the Appendix.

[2]The statute has been discussed by the Alabama Supreme Court in *Weissinger and Crook, Ex Parte,* 7 Ala. 710 (1845); *City of Birmingham v. Bowen,* 254 Ala. 41, 4. So.2d 174; *Atlanta Birmingham and Coast Railroad Co. v. Cary,* 250 Ala. 675, 35 So.2d 559 (1948); *Chapman v. Rivers Construction Co.,* 284 Ala. 633, 227 So.2d 403 (1969); *McAnnally v. Levco, Inc., a corporation,* 456 So.2d 66 (1984); *Hughes v. Hughes* (First Appeal), 362 So.2d 910 (1978); *Central of Georgia Railway Co. v. Stead,* 287 Ala. 64, 248 So.2d 110 (1971).

> A statute, similar to the one under discussion, was in force in this state for 40 years. *See Clay's Digest, 309 Section 20.* We are convinced that the uniform practice of the courts has been to compute the damages only on the principal sum of the judgment. 'This having been the construction of the act for so long a time and the practice having been so universal we do not feel at liberty to disturb it'.

The railroad apparently takes the position that the affirmance fee statute's only purpose is to penalize frivolous or delay appeals. The Supreme Court of Alabama in the case of *Montgomery Light & Power Co. v. Thombs,* 204 Ala. 678, 87 So. 205 (1920), did say that the purpose was to penalize frivolous or delay appeals. The court, however, was not called upon in that case to specify all of the reasons supporting the validity of the statute. In the case of *Snellings v. Builders' Supply Co.,* 229 Ala. 1, 155 So. 858 (1934), the court declared:

> While this Court incidentally observed in *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 684, 87 So.2d 205 (1920), that Section 6153 Code was intended to penalize frivolous or delay appeals, it was not intended to assert that such was its only purpose and that the province of this Court was to determine whether an appeal was frivolous or for delay so as to authorize the statutory damages there provided when the fact stated in Section 6153 are shown by the record. The conditions are (1) a money judgment or decree; (2) that it is suspended on appeal by bond; (3) an affirmance of that judgment on appeal. The only province of this court is to determine whether those conditions exist.

In *City of Birmingham v. Bowen,* 254 Ala. 41, 47 So.2d 174 (1950), the supreme court held that even though the City was not required to file a bond to obtain a stay of execution, it was liable for the penalty. The reasoning of the court was stated as follows:

> The statute as regards Birmingham has only gone one step further and eliminated the necessity of giving any bond at all to supersede the judgment. Nevertheless, the judgment is superseded when the prescription of Section 690 is followed and in our view the real purpose of Section 814 was

> to provide *appellee litigants with the additional damages from superseded judgments when an affirmance has been ordered.* We think under authority of *City of Birmingham v. Simmons, supra,* the City of Birmingham, like all other parties defendant mentioned in 814 is subject to the penalty thereon provided for. (Emphasis supplied)

Construction By The Fifth and Eleventh Circuit Courts of Appeal

The Fifth Circuit Court of Appeals first considered and applied the Alabama affirmance fee statute in the case of *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979). Although this case was subsequently overruled by the Fifth Circuit in *Affholder v. Southern Rock,* 746 F.2d 305 (5th Cir. 1984), it was not done so on the basis of the unconstitutionality of the statute. This case will be discussed further in answer to the second contention.

The Eleventh Circuit Court of Appeals first applied Section 12-22-72 in the case of *Locke v. Allstate Ins. Co.,* 696 F.2d 1340 (11th Cir. 1983), and has consistently applied the statute ever since. In fact, the Eleventh Circuit has been requested to change its position based upon the decision of the Fifth Circuit in *Affholder, supra,* but has refused to do so. Specifically, in *Jackson v. Magnolia Brokerage Co.,* 742 F.2d 1305 (11th Cir. 1984), the Eleventh Circuit overruled an en banc application for rehearing challenging the constitutionality of the statute. The defendant did not accept the ruling of the Eleventh Circuit and filed a petition for writ of certiorari, which this Court denied at 105 S.Ct. 2704 (1985).

Precedent In The Supreme Court of The United States

The Supreme Court of the United States in the case of *Louisville & Nashville Railroad Co. v. Stewart,* 241 U.S. 261 (1916), upheld the validity of a virtually identical statute adopted by the State of Kentucky. Justice Holmes, writing for the Court in this case declared:

> The first of the other objections is that the court of appeals was not authorized to add 10 per cent damages on the amount of the judgment, as it did. But the railroad company obtained a supersedeas, and the law of the state makes 10 per cent the cost of it to all persons if the judgment is affirmed. *There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld. Id.* at 263 (Emphasis supplied)

Petitioner's only reference to this case is in a footnote. The Railroad says this case is not an authority because the constitutionality of the statute was not an issue. Obviously, the validity of the statute was the only issue concerning the affirmance fee. Justice Holmes answered the challenge made to the statute by saying:

> *There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld.* (Emphasis supplied)

Although this case was decided in 1916, the correctness of its holding has never been challenged and should control the present appeal.

The Supreme Court of Alabama followed *Louisville & Nashville R.R. Co. v. Stewart* in the case of *Atlanta, Birmingham & Coast R. R. v. Cary*, 250 Ala. 675, 35 So.2d 559 (1948). This case involved a motion to disallow the 10% affirmance fee, and the court held:

> As we view the matter, this question was settled by the Supreme Court of the United States as far back as 1916 in *Louisville & Nashville R. R. Co. v. Stewart*, 241 U.S. 261, 36 S.Ct. 586, 60 L.Ed. 989, and is conclusive in denial of the motion.

The Supreme Court of Alabama relied upon *Louisville, supra*, to uphold the validity of this statute and should be strong precedent for this Court. On the question of *stare decisis*, this Court in the case of *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1979), observed:

> We note at the outset that the doctrine of *stare decisis* weighs heavily against petitioner in this case. Petitioner seeks to have us overrule our decision in *Ragan*. *Stare decisis* does not mandate that earlier decisions be enshrined forever, of course, but it does counsel that we use caution in rejecting established law. In this case, the reasons petitioner asserts for overruling *Ragan* are the same factors which we concluded in *Hanna* did not undermine the validity of *Ragan*. A litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence. Petitioner here has not met that burden. (Id. at 749)

This statute has been part of the law of Alabama for 166 years. It is one of the oldest statutes in Alabama, and other states have similar statutes. This statute has been considered by the Alabama Supreme Court on many occasions. It has been reviewed by the Eleventh Circuit, the Fifth Circuit and a similar statute reviewed by the Supreme Court of the United States. No court, either federal or state, has held that this kind of statute violates the Fourteenth Amendment.

There Is No Constitutional Right To Stay Execution

There is no constitutional right to have a judgment superseded during the pendency of an appeal. The rule is well stated in 4A C.J.S. *Appeal & Error* Section 269 (1957) as follows:

> The right to have an appeal or a writ of error made a supersedeas is not a constitutional right, and therefore the legislature may impose the terms on which it shall be granted; the regulations concerning a stay of execution on appeal was statutory and the legislature may impose reasonable regulations as a prerequisite for a stay of proceedings.

Litigants do not have an absolute right to any appellate review. In *Lindsey v. Normet*, 405 U.S. 56, 77 (1972), this Court observed:

> This Court has held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide ap-

pellate review, *Griffin v. Illinois,* 351 U.S. 12, 18, 100 L. Ed. 891, 898, 76 S.Ct. 545, 55 ALR2d 1055 (1956); *District of Columbia v. Clawans,* 300 U.S. 617, 627, 81 L.Ed. 843, 847, 57 S.Ct. 660 (1937); *Ohio v. Akron Park District,* 281 U.S. 74, 80, 74 L.Ed. 710, 715, 50 S.Ct. 228, 66 ALR 1460 (1930); *Reetz v. Michigan,* 188 U.S. 505, 508, 47 L.Ed. 563, 566, 23 S.Ct. 390 (1903); *McKane v. Durston,* 153 U.S. 684, 687-688, 38 L.Ed. 867, 868, 14 S.Ct. 913 (1894), and the continuing validity of these cases is not at issue here. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin v. Illinois,* supra; *Smith v. Bennett,* 365 U.S. 708, 6 L.Ed.2d 39, 81 S.Ct. 895 (1961); *Lane v. Brown,* 372 U.S. 477, 9 L.Ed.2d 892, 83 S.Ct. 768 (1963); *Long v. District Court of Iowa,* 385 U.S. 192, 17 L.Ed.2d 290, 87 S.Ct. 362 (1966); *Gardner v. California,* 393 U.S. 367, 21 L.Ed.2d 601, 89 S.Ct. 580 (1969). *Cf. Coppedge v. United States,* 369 U.S. 438, 8 L.Ed.2d 21, 82 S.Ct. 917 (1962); *Ellis v. United States,* 356 U.S. 674, 2 L.Ed.2d 1060, 78 S.Ct. 974 (1958).

The New York Supreme Court in the case of *Devito v. Imbriano,* 30 A.D.2d 796, 332 N.Y.S.2d 577 (1972), considered a state statute which imposed upon an employer a penalty of 20% of the unpaid award unless the award is paid in ten days. The court upheld the validity of that statute by saying:

> It has long been established that appellants do not have a constitutional right to a stay, and that 'a stay is not a matter of right, even if irreparable injury might otherwise result to the appellant'. (*Virginian Ry. Co. v. United States,* 272 U.S. 658, 672, 47 S.Ct. 222, 228, 71 L.Ed. 463; *Matter of Schwartz [Diechmann] v. Delaware National Bank,* 39 A.D.2d 796, 332 N.Y.S.2d 206 (decided herewith)).
>
> The amendment to section 23 removing the automatic stay provision previously contained in that section is valid and constitutional.
>
> Subdivision 3 (c) of section 25 of the Workmen's Compensation Law provides that if the employer or the carrier fails to pay the award within ten days, a penalty of 20 per cent of the unpaid award shall be imposed. The purpose of the amendment to section 25 is to insure that the injured em-

> ployee will receive prompt payment of the award, and such penalty provisions have been upheld as valid. (*Matter of Hart v. Perkins*, 258 N.Y. 66, 179 N.E. 261; *Matter of Beckman v. Piels Brewery*, 28 A.D.2d 1159, 284 N.Y.S.2d 153; *Matter of Urchenko v. City of New York*, 25 A.D.2d 804, 269 N.Y.S.2d 255). Here, the assessment of the penalty was proper.

The instant case illustrates the proposition that a stay of execution is not a constitutional right. The railroad petitioned the Eleventh Circuit for a stay of execution against the collection of the affirmance fee. The petition was denied and it was only by an agreement of counsel that it was not paid while this Court considers the issues raised.

The Fifth Circuit considered a Fourteenth Amendment challenge to a Florida statute in *Empire State Ins. Co. v. Chafetz*, 302 F.2d 829 (5th Cir. 1969). This statute provided attorney's fees to a successful policyholder in a suit against his insuror. Judge Bell relied upon decisions by the Supreme Court in upholding the constitutionality of this statute and said:

> Appellant urges that this statute violates the Due Process and Equal Protection clauses of the Fourteenth Amendment, but this too has been answered adversely to appellant by the Supreme Court of the United States in *Farmers and Merchants Insurance Company v. Dobney*, 1803, 189 U.S. 301, 23 S.Ct. 565, 47 L.Ed. 821; and in *Life and Casualty Insurance Company of Tennessee v. McCray*, 1934, 291 U.S. 566, 54 S.Ct. 482, 78 L.Ed. 987 where Mr. Justice Cardoza, speaking for the court, said:
>
> > We assume in accordance with the assumption of the court below that payment was resisted in good faith and upon reasonable grounds. Even so the unsuccessful defendant must pay the adversary's costs, and costs in the discretion of the lawmaker's may include the fees of an attorney. There are systems of procedure neither arbitrary nor unenlightened, and of a stock akin to ours, in which submission to such a burden is the normal lot of the defeated litigant, whether plaintiff or defendant. The taxing master in the English courts may allow the charges of the barrister as well as the fees of the solicitor. Nothing in the Fourteenth

> Amendment forbids a like procedure here. (*Id.* at 830)

A state is not required to provide for appeal or for the stay of execution pending an appeal. If the State does afford such rights to the litigants, it can place restrictions on those rights which are rationally related to a legitimate state interest. *See City of Cleburne v. Cleburne Living Center,* 105 S.Ct. 3249, 3254 (1985) ; *Lindsey v. Normet, supra.* As the Court observed in *Cleburne,* in deciding whether there is a legitimate state interest, wide latitude is given to the state, and its action is presumed to be valid.

Alabama has an integrated judicial system applying indiscriminately to every party litigant. Before a plaintiff can file a lawsuit, in either the federal or state court, he must pay a substantial filing fee. This fee is required regardless of the merit or weakness of his case. After the case is tried, either party has the right to appeal. This appeal can be taken without superseding the payment of the judgment, and if that procedure is followed, there is no affirmance fee. If he does not want to pay the judgment or subject himself to execution, he can post a supersedeas bond and prevent the collection of the judgment pending resolution by the appellate court. If he elects to avoid payment of the judgment during the pendency of the appeal and is unsuccessful, he is subject to the 10% affirmance fee.

In considering Ala. Code Section 12-22-75, it is necessary to consider additional statutes pertaining to the stay of execution. Some cases involve title and possessory rights in property and do not result in money judgments. Alabama Code Section 12-22-73 (1975) provides:

> When an appeal is taken by the claimant on a trial of the right of property and the judgment is stayed by the execution of a supersedeas bond, if the appellate court affirms the judgment of the court below, it must also enter judgment against the obligors on said bond of 10 percent of the alternative value of the property as fixed by the trial court below.

Alabama Code Section 12-22-74 (1975) deals with supersedeas in cases involving the right to the recovery of chattels in specie. It provides for a 10% penalty when a supersedeas bond is executed, the person in possession retains possession of the property, and loses on appeal. The purpose of these three statutes is to compensate the successful party for the denial of his right to property during the pendency of an unsuccessful appeal. This is a reasonable, fair and just burden placed upon a party who has received a fair trial, but has delayed the payment of the judgment during an unsuccessful appeal.

The existence of these affirmance fee statutes promotes the prompt payment of legitimate debts and discourage useless and futile appeals and thus promote judicial economy and efficiency. That certainly is a legitimate state concern.

The affirmance fee affords the plaintiff slight compensation for being unable to collect a judgment when due. That is a matter of state concern.

A close look at Mr. Wood's situation demonstrates beyond any question that the prompt payment of judgments is a legitimate state concern. Alabama does not permit the recovery of prejudgment interest on a personal injury claim, although at least twenty-five other states do permit recovery of prejudgment interest in tort cases.[8] The federal courts have recognized

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[8]Alaska Stat. Section 09.50.270; 45.45.010 (enacted 1968); Cal. Civil Code Section 3291 (enacted 1982); Colo. Rev. Stat. Section 13-21-101 (enacted 1935); Conn. Gen. Stat. Section 37.3a (enacted 1981); Hawaii Rev. Stat. Section 636-15 (enacted 1979); Iowa Code Section 535.3 (enacted 1980); La. Rev. Stat. Ann. Section 13-4203 (enacted 1916); Me. Rev. Stat. Ann. Tit. 14 Section 1602 (enacted 1969); Md. Cts. & Jud. Proc. Code Ann. Section 11-301 (enacted 1980); Mass. Ann. Laws Ch. 231 Section 6B, supp. Section 11 (enacted 1946); Mich. Comp. Laws Section 600.6013 (enacted 1965); Nev. Rev. Stat. Section 1 (b) 1974 (enacted 1979); N.H. Rev. Stat. Ann. Section 524:1b (enacted 1957); N.J. Rev. Stat. Section 4:42-11 (b); N.Y. Estates Power & Trust Law Section 5-4.3 (enacted 1967); N.C. Gen. Stat. Section 24-5 (enacted 1981); Ohio Rev. Code Ann. Section 1343.03 (enacted 1982); Okla. Stat. Tit. 12 Section 727 (2) (enacted 1971); Pa. Con. Stat. Section 2.31 Rule 2.38 (1979); R.I. Gen. Laws Section 9.21-10 (enacted 1958); Tenn. Code Ann. Section 47-14-123 (enacted 1979); Utah Code Ann. Section 15-1-4; 7-8-27-44 (enacted 1975); Va. Code

the recoverability of prejudgment interest in cases arising under federal law.[4]

The plaintiff has paid his filing fee; has not been permitted to recover prejudgment interest; has gone through the cost of a trial and has prevailed; has successfully resisted a motion for a new trial, and now finds himself in a position where he must suffer the expense of an appeal. The plaintiff in this case is typical of many plaintiffs; he received painful and serious injuries. He underwent two surgical operations that resulted in permanent pain and disability and that will result in a permanent reduction in earnings. *See Woods* 768 at 774. He needs his money now! While he is disabled, he must still pay for housing. He must still pay utility bills. He must still pay for food for his family, and he must still pay the other normal and necessary costs of living.

The Statute Provides Compensation For a Stay of Execution and Not For Taking An Appeal

It must be remembered that the penalty is not assessed because a party appeals, but because the collection of the judgment is stayed during the pendency of an unsuccessful appeal. The railroad in this case was successful in delaying payment of the judgment for nineteen months and now contends that it

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Section 8.01-382 (enacted 1979); W. Va. Code Section 56-3-31 (enacted 1981); Wis. Stat. Section 807.01 (enacted 1980).

[4]*Rodgers v. United States*, 322 U.S. 371 (1947) (Recognition of general proposition that federal courts may exercise equitable powers to grant prejudgment interest in certain cases arising under federal law); *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 989 (6th Cir. 1982) (Labor-Management Relations Act of 1947 and the Employment Retirement Income Security Act of 1974); *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983) (Outer Continental Shelf Lands Act); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 592-595 (2nd Cir. 1961), cert. denied 368 U.S. 989 (1962) (Death on the High Seas Act); *Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724, 728 (5th Cir. 1980) (Death on the High Seas Act); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983) (patent infringement); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959); *Mayer v. Branniff Airways, Inc.*, 310 F.Supp. 194 (N.D. Ill. 1970).

should be permitted to do this without compensation to the plaintiff. It further contends that if it pays interest from the date of the judgment (not from the date of the injury), this is all that justice should require.

If the railroad pays nothing but interest from the date of judgment, it is paying absolutely nothing. It is true that federal and state law provide that interest be paid on a judgment from the date of its rendition until paid. However, if the defendant does not pay the judgment at the time it is rendered, it can invest the money and earn as much, and we respectfully submit in most cases much more, than the legal rate. When it finally pays the interest on the judgment, it is doing nothing more than returning to the plaintiff what was earned on the plaintiff's money while being wrongfully withheld. The defendant is actually collecting more interest than it will pay the plaintiff even if invested in Government bonds. The defendant can compound its interest income whereas the plaintiff can only recover simple interest. For this reason, we state emphatically that it pays nothing when it pays simple interest. All the defendant is required to do is deliver to the plaintiff money which it has earned by delaying payment of the judgment during the appeal.

The railroad further contends that the plaintiff gets a "windfall" by collecting the 10% penalty. What it does not state, is that the money eventually paid the plaintiff does not have the same purchasing power. It is a matter of common knowledge that inflation has steadily increased over the years at more than 5% per year, and in most years, at a much higher rate. When the judgment in this case was finally paid, the purchasing power of the $300,000 award was substantially less than on the day the judgment was entered. The plaintiff, therefore, has not received any windfall. Depending on the state of the economy, a defendant may receive a windfall from the delay even though it pays interest and the 10% affirmance fee.

We attach as part of the Appendix to this brief a copy of Table B-55 Consumer Indexes published by the Department of Labor, Bureau of Labor Statistics. This table assumes that $100

in 1967 would purchase $100 worth of goods and services. In December, 1985, it would require $327.40 to purchase the same goods and services. Had the judgment in this case been paid on the day it was entered (January 13, 1984), $305.20 would have purchased $100 worth of 1967 goods and services. When the judgment was affirmed in the Eleventh Circuit (August 16, 1985), it took $323.50 to buy the same necessities of life. The defendant has had the use of the plaintiff's money all this time. It is evident from a dollar and cents standpoint, the plaintiff has lost. The defendant has gained by having the use of the judgment money while it had a higher purchasing power. The plaintiff has been further penalized by not having the money when he may have needed it most.

No Similar Statute Has Ever Been Held Unconstitutional

The Appellant has not cited a single case in which any appellate court has ever ruled that a similar affirmance fee statute has been held unconstitutional. We have found no case so holding, although there are several states with similar statutes. *See, e.g.*, Ariz. Rev. Stat. Ann. Section 12-2106 (1956); Ga. Code Ann. Section 5-6-6 (1981); Or. Rev. Stat. Section 19.160 (1960). Mississippi and Virginia have enacted affirmance statutes which are substantially identical to the Alabama statute. Miss. Code Ann. Section 11-3-23 (1972); Va. Code Section 16.1-113 (1979).[5]

Answer To Cases Cited By Defendant

Many of the cases cited by the railroad and amicus curiae are landmark decisions on the First and Fourteenth Amendment Constitutional Rights. We see nothing in any of these cases, however, that support its contention in this case. We will

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[5]The courts of those states have found that the purpose of these statutes is to discourage frivolous appeals and to compensate holders of judgments. *See Canal Bank & Trust Co. v. Brewer*, 147 Miss. 920, 114 So. 127 (1927); *Nationwide Mut. Ins. Co. v. Tuttle*, 208 Va. 28, 155 S.E.2d 358 (1967).

comment on these cases to show their inapplicability. The case of *North Carolina v. Pearce*, 395 U.S. 711 (1969), involved the constitutional issue of whether an accused criminal, having been convicted and sentenced and successful in overturning the conviction, could, on a second conviction be given a stronger sentence than he received after the first trial. It also involved the question whether a prisoner is entitled to credit for time spent in prison prior to his conviction. We respectfully submit that this case has nothing to do with an affirmance fee. There are, however, some statements in the opinion which are favorable to the contentions that we are now making. For example, the Court in that case said:

> The result may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply cannot be said that a state has invidiously 'classified' those prisoners whose convictions are not set aside by denying the members of that group the opportunity to be acquitted. To fit the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished. We hold therefore that neither the double jeopardy provision nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction. *Id.* at 722.

The case of *Shapiro v. Thompson*, 394 U.S. 168 (1968), involved a state regulation which denied welfare assistance to residents of the state or district who had not resided within that jurisdiction for at least one year. This Court found there was discrimination, but it was based on the following factual finding:

> There was no dispute that the effect of the waiting period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of those who have resided a year or more and the second of residents who have resided less than a year in the jurisdiction. *Id.* at 627.

The Court held that such a classification was not constitutionally permissible, but it has nothing to do, insofar as we can see, with the constitutionality of an affirmance fee.

In the case of *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), the Court dealt with a school board rule which required a pregnant teacher to quit five months after she became pregnant.

Lindsey v. Normet, 405 U.S. 56 (1972), cited and relied upon by Appellant, when read in its entirety supports the contentions of the Appellee rather than those of the Appellant. Obviously, the Oregon statute involved in that case discriminated against tenants, and the Court so held. It then reiterated the fundamental constitutional right by saying, ". . . *if a full and fair trial on the merits is provided, the due process clause of the fourteenth amendment does not require a state to provide appellate review.*" (Emphasis supplied)

In *Griffin v. Illinois,* 351 U.S. 12 (1956), the Court dealt with the question of the right of a convicted criminal to a free transcript in order to effect his appeal. *Jimenez v. Weinberger,* 417 U.S. 628 (1974), dealt with the right of an illegitimate child to social security benefits; *Rinaldi v. Yeager,* 384 U.S. 305 (1966), involved a claim of discrimination by a prisoner who was required to pay for his transcript of testimony when other prisoners were not. *Plyler v. Doe,* 457 U.S. 202 (1982), dealt with a claim of discrimination on the part of aliens who were not permitted to enter the public school system. The issues in those cases and the other cases cited by Appellant have nothing to do with affirmance fees or orders staying the execution of judgments. The issues are so foreign to the issues involved in this case they are not apt authority.

Alabama Code Section [illegible]72 (1975) Does Not Discriminate

As we understand the contention of the Appellant, their only claim of discrimination is based on the fact that the affirmance fee applies against defendants but not against plaintiffs. The answer to that contention is quite obvious. The fee is assessed because the defendants have obtained a stay of execution. If no stay is obtained, no fee is taxed. There is nothing for the plain-

tiff to stay. If he loses, no money judgment is rendered against him and there is nothing to supersede. He is required, however, to post a cost bond to appeal and pay the costs if he is unsuccessful. He may also be required to pay damages if his appeal is held to be frivolous. Of course, if the defendant obtains a money judgment (on a counter-claim or otherwise) against the plaintiff and the plaintiff stays execution and loses, the affirmance fee would be awarded against him.

There is an incentive for a defendant to appeal. There is also an incentive for a defendant who has suffered a money judgment to supersede execution on that judgment. As long as the defendant is holding the money, it can use it. If the defendant obtains any relief on appeal, it does not have to pay the fee. And if it should be successful in reversing the case, the whole process starts over. A plaintiff has no incentive for filing a useless appeal. When the plaintiff loses, he gains nothing, but is taxed with additional costs. He, therefore, falls within an entirely different classification.

No justice of the Alabama Supreme Court has ever questioned the validity of this statute, and there have been literally hundreds of justices to sit on the court during the last 166 years. To our knowledge, there has never been a bill introduced in the State Legislature attempting to change the statute although there have been hundreds of bills passed which affect litigation. It is evident that the people of Alabama, including the bench and bar, have considered this to be a just, reasonable and fair piece of legislation.

The Supreme Court of the State of California in the case of *Trede v. Superior Court,* 21 Cal.2d 630, 134 Pa.2d 745 (1943), succinctly stated the rule by saying:

> There is no constitutional right to an appeal; the appellate procedure is entirely statutory and subject to complete legislative control. A corollary of this rule is that the legislature may impose any condition or restriction upon the granting of a stay of execution pending an appeal. *See United States v. Berg,* 202 Cal. 10, 258 P. 942; *Abelleira v.*

District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942; *Foster v. Superior Court,* 115 Cal. 279, 47 P. 58.

Whether the legislature provided the best and most equitable procedure for appeal is not the issue. This Court in the case of *Williamson v. Lee Optical,* 348 U.S. 464 (1955), said:

> The law may not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the due process clause of the fourteenth amendment to strike down state laws, regulatory or business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought. *See Nebbia v. New York,* 291 U.S. 502; *West Coast Hotel Co. v. Parrish,* 300 U.S. 379; *Olsen v. Nebraska,* 313 U.S. 236; *Lincoln Federal Labor Union, A.F.L. v. Northwestern Iron & Metal Co.,* 335 U.S. 525; *Daniel v. Family Secur. Life Ins. Co.,* 336 U.S. 220; *Day Brite Lighting, Inc. v. Missouri,* 342 U.S. 421. We emphasize again what Chief Justice Waite said in *Munn v. State of Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77: 'For protection against abuses by the Legislatures that people must resort to the polls not the Courts'. *Id.* at 487-88.

We respectfully submit that the affirmance fee statute is reasonable; it serves a legitimate state purpose; it is fair and just and for the reasons hereinabove stated, it does not result in a windfall for the plaintiff. It hopefully enables him to collect his money without having to wait a long period of time, and to have it when he may need it most.

II. Alabama Code Section 12-22-72 (1975) Does Not Unlawfully Infringe Upon The Constitutional Right To Petition The Government For a Redress of Grievances

The amicus curiae brief filed on behalf of the Association of Southern California Defense Counsel contends that the affirmance fee statute is unconstitutional under the First Amend-

ment. It will be noted that this particular constitutional issue was not presented to the Eleventh Circuit when the matter was pending in that Court, and it has not been asserted as a ground for declaring the act unconstitutional by the attorneys who represent the railroad in this case. This issue will be addressed since it has been raised by the amicus curiae brief. Again, we cannot see that any of the cases cited to support this contention have any relevance to the issue in this case, although they are landmark cases on constitutional law.

This Court, in the case of *United Mine Workers of District A, District 12 v. Ill. State Bar Assoc.*, 389 U.S. 217 (1967), dealt with a fact situation in which the state bar association tried to enjoin the union from engaging in certain practices alleged to constitute the unlawful practice of law. The bar association contended that the union had hired an attorney on a salary basis to represent its members before the Illinois Industrial Commission in workmen's compensation cases. The Court held that the arrangement which the union had with its salaried lawyer was permissible. Specifically, the Court held (Justice Black):

> The decree at issue here thus substantially impairs the associational rights of the mine workers and is not needed to protect the state's interest in high standards of legal ethics. In the many years the program has been in operation there has come to light, so far as we are aware, not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the union and the attorney who represents its members. *Id.* at 225.

In *NAACP v. Button*, 371 U.S. 415 (1966), the state of Virginia attempted to enforce a law which made it a crime to advise another that his legal rights had been infringed and referring him to a particular attorney or group of attorneys for assistance, and knowingly rendering legal assistance to the person thus referred. The Court held this did constitute an unlawful restraint upon the NAACP's freedom of expression and association. In the opinion, the Court commented upon the

fact that this was the only way that black people could protect their constitutional rights.

In *Sherbert v. Vernen*, 374 U.S. 398 (1962), the Court dealt with a case in which the plaintiff was denied unemployment compensation benefits because she was fired for not working on Saturdays. She was a Seventh Day Adventist and it was against her religious beliefs to work on Saturday. The court held, after stating what it was not holding:

> Our holding today is only that South Carolina may not constitutionally apply the eligibility provision so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade ago, namely that no state may exclude individual Catholics, Lutherans, Mohammedans, Baptist, Jews, Methodists, nonbelievers, Presbyterians, or the members of any other faith because of their faith or lack of it from receiving the benefits of public welfare legislation.
>
> In view of the results we have reached under the First and Fourteenth Amendments' guarantee of free exercise of religion, we have no occasion to consider appellant's claim that the denial of benefits also deprived her of the equal protection of the laws in violation of the Fourteenth Amendment. *Id.* at 410.

The Court in *Buckley v. Aleo*, 424 U.S. 1 (1976), dealt with a law pertaining to financial disclosure by political candidates. The opinion is almost 200 pages in length and we have found nothing in it which can be construed to support the contention of the California insurance lawyers that the Alabama statute is violative of the First Amendment.

The defense lawyers of the State of California contend that this statute deprives insurance companies of their right to seek redress in the appellate courts of Alabama. It is interesting to note that the Alabama Defense Lawyers Association has not filed a brief making this contention and the Alabama lawyers for the railroad did not make it. If defendants in Alabama felt the statute denied access to the courts, it is strange that they waited 166 years to make their feelings known to either the

Court or the Legislature. We respectfully submit there is no valid reason to abolish this Alabama law, which has been applied to all parties for such a long period of time.

III. The Alabama Affirmance Fee Statute Should Be Applicable In The Eleventh Circuit Court of Appeals In Diversity Actions Governed By Alabama Law

The railroad contends the Alabama statute conflicts with the Federal Rules of Appellate Procedure. The railroad's argument on this point is based on its interpretation of *Hanna v. Plummer*, 380 U.S. 460 (1965). This identical argument was advanced by the appellant/petitioner and rejected by the Eleventh Circuit in *Jackson v. Magnolia Brokerage Company*, 742 F.2d 1305 (11th Cir. 1984) *cert. denied*, 105 S.Ct. 2704 (1985).

In *Hanna*, and subsequently in *Walker v. Armco Steel Corporation*, 446 U.S. 740 (1980), this Court clarified the analysis which a federal court should employ when, in an action based upon the court's exercise of diversity jurisdiction, a state law is alleged to conflict with a federal rule of procedure. If the federal rule "directly conflicts" with the state law, the court must then determine whether the federal rule is within the scope of the Enabling Act, 28 U.S.C. Section 2072 (1977), and supported by a constitutional grant of federal power. *See Hanna* at 471-74; *Walker* at 749. The railroad contends, in effect, that whenever it appears that the issue in question is merely addressed by the federal rule, a *Hanna* analysis is essential. According to the railroad, *Hanna* requires almost mechanical disregard for state law on all matters which are covered by a federal rule.

We submit that a *Hanna* analysis that compels a federal court to disregard state law is dependent upon a preliminary finding of the existence of a "direct collision" or an "unavoidable collision" between the federal rule and the state law. *See Hanna* at 470, 472; *Walker* at 749. In determining the existence of a direct collision, the Court should give consideration to the ef-

fect that application of the state law would have on the federal rule. In *Hanna,* this Court dealt with a state law which in effect would have totally defeated the purpose and operation of the applicable federal rule. This Court noted:

> The Erie rule has never been invoked to *void* a Federal Rule. It is true that there have been cases where this Court had held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded *displacement* of a Federal Rule by an inconsistent state rule, but that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforcement of state law. *Id.* at 470, (Emphasis supplied).
>
> To hold that a Federal Rule of Civil Procedure must *cease to function* whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress's attempt to exercise that power in the Enabling Act. *Id.* at 473-74, *See also Walker* at 747-48, (Emphasis supplied).

We submit there is not a direct or unavoidable collision between Ala. Code Section 12-22-72 and the federal rules, nor does the Alabama law avoid or displace the federal rules or cause them to cease to function.[8]

The Alabama statute addresses a problem that the federal rules do not. The Alabama statute applies only if three conditions are present: (1) a money judgment is entered; (2) the judgment is stayed on appeal; and (3) the appellate court affirms the judgment. *See Snellings v. Builders' Supply Co.,* 229 Ala. 1, 155 So. 858 (1934). Federal Rules of Appellate Procedure, Rule 38, in contrast, permits the appellate court to award

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[8]It should be noted that the contrary is not true. Petitioner's position, if adopted, would completely vitiate the Alabama statute. As a result, defendants in federal courts in Alabama would be accorded significantly different and better treatment than defendants in the state courts of Alabama. This effect is offensive to the *Erie* rationale (see *Hanna* at 467) and would provide defendants with an illegitimate motive to remove cases to the federal court.

damages and costs to any party if it determines that his opponent's appeal is frivolous.

It is significant to note that the Supreme Court of Alabama has adopted a state counterpart to F.R.A.P. 38, which is A.R.A.P., Rule 38. The two rules are virtually identical. The railroad's contention that there is a direct conflict between the subject statute and the federal rule is utterly inconsistent with the fact that the Alabama Supreme Court has applied *both* the affirmance fee statute and the state frivolous appeal rule in the same case. *See McNally v. Levco, Inc.*, 456 So.2d 66, 67 (Ala. 1984). In *McNally*, a unanimous court awarded damages under Rule 38 A.R.A.P. upon a finding that the appellant had filed a frivolous appeal. It further awarded damages under Code Section 12-72-22, and said:

> Because the conditions for an award under Section 12-72-22 have been met, we hold that the 10% damages under Section 12-72-22 should be assessed against appellant. *Id.* at 67.

The Alabama affirmance fee statute is not designed to supplant the authority of an appellate court (state or federal) to impose monetary sanctions on those who prosecute frivolous appeals. The state and federal procedural rules apply to frivolous appeals, whereas the affirmance statute applies only to money judgments stayed on appeal and later affirmed. Put another way, the procedural rules cover a ground which the statute does not.

The Alabama statute does not conflict with F.R.A.P. 8. That Rule merely provides that a federal court of appeals may stay a judgment pending appeal and may condition such relief upon the filing of a bond or other security. Federal Rules Appellate Procedure Rule 8, does not purport to provide for or to prohibit the assessment of costs or damages against an appellant who has stayed execution and lost.

As Justice Harlan observed in his concurring opinion in *Hanna*, the *Erie* decision reflected more than just the Court's concerns about forum-shopping and equitable administration of the laws. *Hanna*, 380 U.S. at 474. That decision remains

"one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of power between the state and federal systems." *Id.* Alabama has not seen fit to permit the recovery of prejudgment interest on money judgments in tort cases, although, as previously stated, at least twenty-five states do have statutes or rules permitting the recovery of such interest. The Alabama Legislature could follow the trend of other states in the enactment of such a statute, but it has not done so. The Alabama affirmance fee statute compensates the injured plaintiff for the additional expenses associated with an appeal and for the loss of the use of the money retained by the defendant during the pendency of his appeal.

As the Fifth Circuit correctly concluded in *Proctor v. Gissendaner*, 587 F.2d 182, 1984 (5th Cir. 1979), for purposes of *Erie*, the Alabama statute is *substantive* — not merely procedural as the railroad contends.[7] As *Hanna* and *Walker* indicate, the *Erie* analysis is supplanted only if the state statute directly conflicts with a federal rule of procedure. If not, the state's policies, as embodied in its own statutes, must be honored by the federal court. The plaintiff is a citizen of Alabama and filed

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[7]The Fifth Circuit refused to apply a Mississippi statute that assessed a 15% penalty against a litigant who unsuccessfully appealed in *Affholder v. Southern Rock*, 746 F.2d 305 (5th Cir. 1984). In the same opinion, the Court stated the Fifth Circuit would no longer apply *Proctor, supra*. The rationale for this change in position was that F.R.A.P., Rule 38 superseded the Mississippi statute. In *Proctor*, the Fifth Circuit held that the Alabama statute created a substantive right and said:

> In diversity cases, federal courts are Erie-bound to apply the substantive law of the forum state. *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Here there can be no doubt that we are dealing with an Alabama-created non-federal substantive matter. Accordingly, this court is bound to apply Alabama law.

Regardless of the reason that might be assigned to support this holding, the end result is to deny a plaintiff a right which the same circuit held to be substantive in *Proctor, supra*. This because the federal rules simply do not provide for an affirmance fee. The Eleventh Circuit correctly refused to follow this holding of the Fifth Circuit. *See Jackson, supra*.

We respectfully submit that the Fifth Circuit was correct in *Proctor* and incorrect in *Affholder*. The Alabama statute applies to one set of circumstances and Rule 38 applies to an entirely different problem.

his suit in the state court. The railroad should not be permitted to deprive him of his substantive right to recover certain damages by removing the case to the federal court.

CONCLUSION

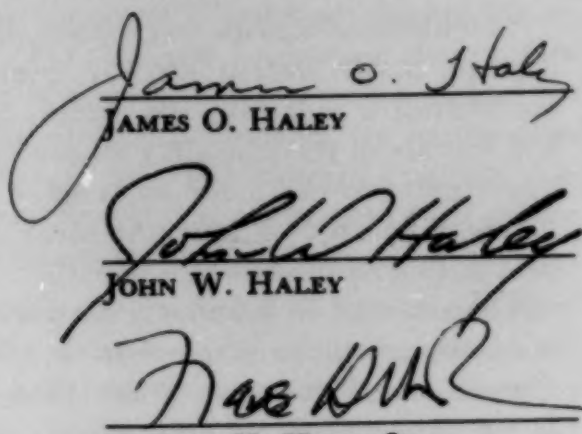
The Eleventh Circuit was correct when it awarded the 10% damages under Section 12-22-72, over nineteen months after the plaintiff's judgment was due to be paid. The defendant had the use of the plaintiff's money during that time and the opportunity to use it for its benefit. It is facetious to argue that he is not injured when the payment of his judgment is not paid during an unsuccessful appeal.

The award of an affirmance fee pursuant to this state statute is no different in principle than an award of pre or post judgment interest. Neither is it any different in principle than an award of a penalty for not paying a workmen's compensation award when it is due or an award of an attorneys' fee against an insurance company for unsuccessfully litigating a claim by a policyholder. The same would be true with respect to the provisions of the Truth & Lending Act which provides for attorneys' fees in suits brought under that act by borrowers. The wisdom of such provisions historically has been left to the legislative bodies.

The plaintiff's action was originally filed in State court and it would indeed be unjust if the defendant could profit by removing this case to federal court to deny the plaintiff's right to recover damages provided under Alabama Law. Such a ruling would discriminate against the individual citizen and afford an incentive for forum shopping by the defendant and give to the foreign defendant an advantage which a local individual or corporation would not enjoy.

This Court should affirm the judgment of the Eleventh Circuit awarding to the plaintiff the 10% damages as provided by Alabama Law.

Respectfully submitted,



JAMES O. HALEY

JOHN W. HALEY

FRANCIS H. HARE, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing upon all attorneys of record by placing a copy of same in the U.S. mail, postage prepaid, on this the 23rd day of June, 1986, and addressed to the following:

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APPENDICES

§ 12-22-72. Affirmation of stayed judgment — Generally.

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs by the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court. (Code 1852, §§ 3032, 3033; Code 1867, §§ 3500, 3501; Code 1876, §§ 3941, 3942; Code 1886, §§ 3661, 3662; Code 1896, § 478; Code 1907, § 2893; Code 1923, § 6153; Code 1940, T. 7, § 814; Acts 1951, No. 724, p. 1275.)

§ 12-22-73. Same — Right of property.

When an appeal is taken by the claimant on a trial of the right of property and the judgment is stayed by the execution of a supersedeas bond, if the appellate court affirms the judgment of the court below, it must also enter judgment against the obligors in said bond of 10 percent of the alternative value of the property as fixed by the trial court below. (Code 1852, § 3024; Code 1867, § 3494; Code 1876, § 3935; Code 1886, § 3663; Code 1896, § 479; Code 1907, § 2894; Code 1923, § 6154; Code 1940, T. 7, § 815.)

§ 12-22-74. Same — Recovery of chattels in specie.

Upon the affirmance of a judgment for the recovery of chattels in specie, judgment for which has been stayed by the execution of a supersedeas bond, the court must also enter judgment against the obligors in said bond for 10 percent of the alternative value of such property as fixed by the court below, and the damages fixed for the detention thereof. (Code 1852, § 3027; Code 1867, § 3495; Code 1876, § 3936; Code 1886, § 3664; Code 1896, § 480; Code 1907, § 2895; Code 1923, § 6155; Code 1940, T. 7, § 816.)

SUPREME COURT OF ALABAMA.

HEART v. JUDSON.

(December, 1823.)

1. Writ of error issued by clerk after expiration of his term of office, quashed.
2. Ten per cent. damages to be adjudged in all cases on judgment affirmed on writ of error or appeal taken since the Act of 1820.

SAFFOLD, J. — In this case the writ of error, as issued by R. Tankersly, as clerk, bears date 1st September, 1823, after the expiration of his term of office. The defendant in error moves to quash the writ, and produces a copy of the citation issued 17th of June, 1823, showing that a writ of error had previously issued. Neither this nor the corresponding transcript of the record had been filed. He moves to quash the writ of error, and for an affirmance of the judgment. The writ of error must unquestionably be quashed. The plaintiff in error refers to the transcript of the record to show that the judgment was on an unliquidated demand, and contends, under the authority of the Statute of 1819, that no damages are recoverable. This act provides that "in all cases bottomed on a contract, note, agreement, or liquidated account, where the judgment of the Circuit Court may be affirmed, fifteen per cent. damages shall be allowed," etc. Laws Ala. 168. Admitting that this transcript is sufficiently before us to show that the action was not founded on a liquidated demand, the Act of 1820 directs that whenever the judgment of a Circuit Court shall, on appeal or writ of error, be affirmed, ten per cent. damages shall be allowed and not more, etc. Laws Ala. 483. This last act does not restrict the right to recover damages to actions founded on liquidated demands, but allows them at the rate last mentioned in all cases where the judgment of a Circuit Court may be affirmed by this court. The terms of the last statute are general, not restricted like the first, as to the description of actions; and in this respect, as well as in amount of damages, the first is clearly contravened

by the last. If it were for us to consider the reason and policy of the statutes, it would seem that an obstinate debtor who refuses to liquidate his debt, should not be benefited by his injustice; and even in actions *ex delicto*, the satisfaction of the judgment should not be delayed without responsibility for damages.

It is the unanimous opinion of the court that the judgment of the Circuit Court be affirmed, with ten per cent. damages.

TABLE B–55.—*Consumer price indexes, major expenditure classes, 1946–83*

(1967 = 100)

Year or month	All items	Food and beverages		Housing				Apparel and upkeep	Transportation	Medical care	Entertainment	Other goods and services	Energy [3]
		Total [1]	Food	Total [2]	Shelter	Fuel and other utilities [2]	Household furnishings and operation [2]						
1946	58.5		58.1	60.6				67.5	50.3	44.4			
1947	66.9		70.6	65.2				78.2	55.5	48.1			
1948	72.1		76.6	69.8				83.3	61.8	51.1			
1949	71.4		73.5	70.9				80.1	66.4	52.7			
1950	72.1		74.5	72.8				79.0	68.2	53.7			
1951	77.8		82.8	77.2				86.1	72.5	58.3			
1952	79.5		84.3	78.7				85.3	77.3	59.3			
1953	80.1		83.0	80.0	76.5	83.0	91.3	84.6	79.5	61.4			
1954	80.5		82.8	81.7	78.2	83.5	90.9	84.5	78.3	63.4			
1955	80.2		81.6	82.3	79.1	85.1	89.9	84.1	77.4	64.8			
1956	81.4		82.2	83.6	80.4	87.3	89.9	85.0	78.8	67.2			
1957	84.3		84.9	86.2	83.4	89.9	91.9	87.3	83.3	69.9			90.1
1958	86.6		88.5	87.7	85.1	91.7	92.3	87.5	86.0	73.2			93.3
1959	87.3		87.1	88.6	86.0	93.0	93.1	88.2	89.6	76.4			91.8
1960	88.7		88.0	90.2	87.8	95.9	93.8	89.6	89.6	79.1			94.2
1961	89.6		89.1	90.9	88.5	97.1	93.7	90.4	90.6	81.4			94.4
1962	90.6		89.9	91.7	89.6	97.3	93.8	90.9	92.5	83.5			94.7
1963	91.7		91.2	92.7	90.7	98.2	94.6	91.9	93.0	85.6			95.0
1964	92.9		92.4	93.8	92.2	98.4	95.0	92.7	94.3	87.3			94.8
1965	94.5		94.4	94.9	93.8	98.3	95.3	93.7	95.9	89.5			96.3
1966	97.2		99.1	97.2	96.8	98.8	97.0	96.1	97.2	93.4			97.8
1967	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
1968	104.2	103.6	103.6	104.0	104.8	101.3	103.8	105.4	103.2	106.1	105.7	105.2	101.5
1969	109.8	108.8	108.9	110.4	113.3	101.6	107.7	111.5	107.2	113.4	111.0	110.4	104.2
1970	116.3	114.7	114.9	118.2	123.6	107.6	111.5	116.1	112.7	120.6	116.7	116.8	107.0
1971	121.3	118.3	118.4	123.4	128.8	115.0	115.7	119.8	118.6	128.4	122.9	122.4	111.2
1972	125.3	123.2	123.5	128.1	134.5	120.1	118.3	122.3	119.9	132.5	126.5	127.5	114.3
1973	133.1	139.5	141.4	133.7	140.7	126.9	121.6	126.8	123.8	137.7	130.0	132.5	123.5
1974	147.7	158.7	161.7	143.8	154.4	150.2	135.3	136.2	137.7	150.5	139.8	142.0	159.7
1975	161.2	172.1	175.4	164.5	169.7	167.8	151.0	142.3	150.6	168.6	152.2	153.9	176.6
1976	170.5	177.4	180.8	174.6	179.0	182.7	160.1	147.6	165.5	184.7	159.8	162.7	189.3
1977	181.5	188.0	192.2	186.5	191.1	202.2	167.5	154.2	177.2	202.4	167.7	172.2	207.3
1978	195.4	206.3	211.4	202.8	210.4	216.0	177.7	159.6	185.5	219.4	176.6	183.3	220.4
1979	217.4	228.5	234.5	227.6	239.7	239.3	190.3	166.6	212.0	238.7	188.5	196.7	275.9
1980	246.8	248.0	254.6	263.3	281.7	278.6	205.4	178.4	249.7	265.9	205.3	214.5	361.1
1981	272.4	267.3	274.6	293.5	314.7	319.2	221.3	186.9	280.0	294.5	221.4	235.7	410.0
1982	289.1	278.2	285.7	314.7	337.0	350.8	233.2	191.8	291.5	328.7	235.8	259.9	416.1
1983	298.4	284.4	291.7	323.1	344.8	370.3	238.5	196.5	298.4	357.3	246.0	288.3	419.3
1984	311.1	295.1	302.9	336.5	361.7	387.3	242.5	200.2	311.7	379.5	255.1	307.7	423.6
1985	322.2	302.0	309.8	349.9	382.0	393.6	247.2	206.0	319.9	403.1	265.0	326.6	426.5
1984: Jan	305.2	291.6	299.4	329.2	353.2	376.0	240.4	196.4	308.0	369.5	249.9	300.5	416.7
Feb	306.6	294.2	302.1	331.0	354.0	383.0	240.4	196.2	305.8	373.2	251.5	301.5	420.2
Mar	307.3	294.3	302.2	331.5	355.5	380.1	241.2	198.8	306.9	374.5	251.7	302.1	418.1
Apr	308.8	294.5	302.3	333.2	357.8	380.9	242.3	199.2	309.6	375.7	253.8	302.8	421.3
May	309.7	293.6	301.4	334.6	358.9	385.5	242.4	198.9	312.2	376.8	253.5	303.2	426.1
June	310.7	294.3	302.0	336.2	360.2	390.0	242.3	197.4	313.1	378.0	254.5	304.4	428.5
July	311.7	295.3	303.2	338.1	362.7	393.9	241.9	196.6	312.9	380.3	255.3	306.5	428.3
Aug	313.0	296.9	304.8	339.5	364.6	395.5	242.2	200.1	312.9	381.9	256.4	307.2	427.3
Sept	314.5	296.4	304.2	341.4	366.5	397.8	244.1	204.2	313.7	383.1	257.3	314.6	429.0
Oct	315.3	296.6	304.4	341.2	367.8	392.4	244.3	205.7	315.5	385.5	258.3	315.8	426.7
Nov	315.3	296.3	304.1	340.9	368.9	387.5	244.2	205.2	316.1	387.5	259.0	316.5	421.8
Dec	315.5	297.2	305.1	341.2	370.1	386.0	244.2	203.2	315.8	388.5	260.1	316.7	418.9
1985: Jan	316.1	299.3	307.3	342.9	371.2	387.2	244.2	199.8	314.7	391.1	261.0	319.1	414.5
Feb	317.4	301.4	309.5	343.6	373.3	386.5	245.2	201.8	314.3	393.8	261.3	320.5	411.4
Mar	318.8	301.6	309.7	344.7	374.3	388.2	246.9	205.3	316.7	396.5	262.2	321.1	416.6
Apr	320.1	301.6	309.6	345.9	375.9	388.7	247.9	205.9	320.0	398.0	263.3	321.8	424.4
May	321.3	301.0	308.9	348.5	379.5	393.0	247.6	205.3	321.4	399.5	263.6	322.3	431.7
June	322.3	301.4	309.3	350.4	381.8	399.4	247.1	204.6	321.8	401.7	264.	323.0	436.8
July	322.8	301.6	309.5	351.6	383.2	399.9	246.5	202.8	321.8	404.0	265.7	325.0	437.1
Aug	323.5	301.8	309.7	352.9	385.9	398.9	247.0	205.3	320.7	406.6	265.7	326.0	433.8
Sept	324.5	302.1	309.9	353.8	386.9	400.5	247.1	209.6	319.7	408.3	266.8	333.3	432.6
Oct	325.5	302.5	309.8	354.4	389.1	395.6	248.4	211.1	320.9	410.5	268.4	334.9	427.1
Nov	326.6	303.6	311.0	355.0	391.3	392.1	248.9	211.2	323.2	413.0	269.0	335.3	425.1
Dec	327.4	305.6	313.2	355.8	392.3	393.3	248.8	209.0	324.0	414.7	268.3	336.5	426.5

[1] Includes alcoholic beverages, not shown separately.
[2] Series beginning 1967 not comparable with series for earlier years.
[3] See Tables B–56 and B–57.

NOTE.—Data beginning 1978 are for all urban consumers; earlier data are for urban wage earners and clerical workers.

Data beginning 1983 incorporate a rental equivalence measure for homeowners' costs and therefore are not directly comparable with earlier figures. See *Economic Report of the President*, February 1983 for homeownership costs as measured prior to 1983.

SOURCE: Department of Labor, Bureau of Labor Statistics.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

ANTHONY L. JACKSON, et al.,
Plaintiffs-Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Alabama

(November 21, 1984)

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

O R D E R :

IT IS ORDERED that the application for 10% allowance to judgment pursuant to Title 12, Code of Alabama, Section 12-22-72 (1975) be, and the same hereby is, GRANTED.

The Fifth Circuit decided in *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979), that the Alabama statute which provides for the addition of 10% of a judgment which is stayed and unsuccessfully appealed is binding in a federal appellate court under *Erie v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188 (1938). This Court has adopted the decisions of the Court of Appeals for the Fifth Circuit rendered prior to October 1, 1981 as binding precedent of this Court, subject to overrule only by the court sitting *en banc. Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981). Accordingly, this Court is bound by *Proctor. See Locke v. Allstate Ins. Co.,* 696 F.2d 1340 (11th Cir. 1983); *King v. Ford Motor Co.,* 604 F.2d 317 (5th Cir. 1979). *See also Walters v. Inexco Oil Co.,* 725 F.2d 1014 (5th Cir. 1984); *but see Affholder v. Southern Rock,* ____ F.2d ____ (5th Cir. 1984) [No. 83-4420].